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THE

RULE OF EX PARTE WARING.

BY

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OF LINCOLN'S INN, BARRISTER-AT-LAW.

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THE RULE OF EX PARTE WARING.

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CHAPTER I.

THE rule of *Ex parte Waring*[a] which was laid down by Lord Eldon in the year 1815 has ever since been held as an established principle in Equity.

The cases to which it has been applied, especially in recent times, have been of very frequent occurrence; have arisen under varied circumstances; and have sometimes involved considerable difficulty.

I have thought that it might be useful to collect these cases in chronological order, so as to trace the successive stages through which the rule has passed from its earliest establishment down to the present time.

This may be of more practical importance as, under the recent Judicature Acts, this rule (being one of the rules of Equity) may have to be applied by all the Divisions of the High Court of Justice.[b]

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[a] 19 Ves. 345; s. c. 2 Gl. & Jam. 404; 2 Rose, 182.

[b] 36 & 37 Vict., c. 66, s. 25, sub-s. 11.

The case of *Ex parte Waring* (which is reported in 19 Ves. 345, and also to the same effect in 2 Gl. & Jam. 404, and 2 Rose 182) was as follows :—

Brickwood & Co. were bankers in London, and *Bracken & Co.*, manufacturers in Lancashire, were customers of their Bank. *Bracken & Co.*, by virtue of an agreement between themselves and *Brickwood & Co.*, were in the habit of drawing bills upon the latter, and depositing with them other bills and securities for the purpose of meeting their acceptances at maturity. *Brickwood & Co.* became bankrupts in July, 1810. At that time they were under acceptances in favour of *Bracken & Co.* to the amount of £24,000, but to meet those acceptances they held securities which had been deposited for that purpose by *Bracken & Co.* in the shape of short bills and title deeds of an estate. These securities were more than sufficient to cover the acceptances.

In August, 1810, *Bracken & Co.* also became bankrupt. The holders of the bank's acceptances proved under both commissions of bankruptcy against both estates, and received dividends. Afterwards they presented a petition to the Court of Bankruptcy, insisting that they were entitled to have the produce of the securities deposited by *Bracken & Co.* with *Brickwood & Co.* specifically applied in discharge of their acceptances. Lord Eldon, after disallowing the ground upon which the billholders based their claim, *viz.*, that those who had contracted out of the deposited securities

to pay certain debts were liable in Equity to the demand of the persons to whom payment was to be made, proceeded as follows (p. 348):—

"The first consideration is, what was the nature of the demand of *Bracken & Co.*, who did not become bankrupt until August, upon *Brickwood & Co.*, at the moment of their bankruptcy, on the 7th July. If these bill-holders are to have payment in preference to the other creditors, it must be by the effect of an equity between those two houses, rather than by any demand directly in their own right upon any fund in the hands of *Brickwood & Co.* With regard to the demand of *Bracken's* house, upon the 7th of July, it is impossible to deny that, if they had either paid, or undertaken to pay (*i. e.*) to relieve *Brickwood's* house from those acceptances, the short bills and the mortgage must have been restored to them. It is, on the other hand, equally clear, that they never could have raised any demand against the house of *Brickwood* in respect of either the cash balance, the short bills, or the mortgage, without bringing in the amount of those acceptances; admitting, that what the house of *Brickwood* had of their property in short bills, &c., must be first applied to the discharge of those acceptances, for the sake, not of the bill-holders, but of the house of *Brickwood;* who had become liable to them; and had a right to have that liability cleared away before any demand could arise for the *Brackens.* That then being the equity between these houses in the interval between their respective bankruptcies it does not appear to me varied by the bankruptcy of the *Brackens* in August; supposing their assignees to have put the estate of *Brickwood* in the same situation as the house they represent, if solvent, must have done, to entitle themselves to the short bills; and having regard to the demands of all the creditors and the bankrupts, in this circuitous way, I think, the billholders must be paid, not as having a demand upon these funds in respect of the acceptances they hold, but as the estate of *Brickwood & Co.*, must be

cleared of the demand by their acceptances; and the surplus, after answering that demand, must be made good to *Bracken & Co.*"

I subjoin in the appendix a copy of the order made in the case. It will also be found in a note to the case of *Powles* v. *Hargreaves*.[c]

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[c] 3 De G. M. & G. 445.

CHAPTER II.

BEFORE proceeding to the cases in which the rule of *Ex parte Waring* has been applied, it may be advisable to make a few observations upon the general character of the rule itself.

In its simplest application it may be expressed in the following formula:—

Where, as between the drawer and the acceptor of a bill of exchange, a security has, by virtue of a contract between them, been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor; then, if both drawer and acceptor become insolvent, and their estates are brought under a forced administration, the billholder, though neither party nor privy to the contract, is entitled to have the specifically appropriated security applied, in or towards payment of the bill.

It will be observed that the billholder is assumed to have no independent right of his own to have the security so applied. He is simply the holder of a negotiable instrument; and, as such, is entitled upon the bankruptcy or insolvency of the parties liable upon it, to prove against their

respective estates for the full amount due, and to receive dividends on such proofs in competition with the other creditors of both estates.

His right, under the rule, solely springs out of the equitable rights subsisting between the estates of the drawer and the acceptor.

These equitable rights may be thus stated:—

1. The acceptor, by virtue of the contract for specific appropriation subsisting between himself and the drawer, is entitled to hold the security, deposited with him, as an indemnity against the liability he has incurred to the billholder by accepting the bill. But, subject to this right of indemnity, the property in the security remains in the drawer. It is therefore clearly the interest of the acceptor's other creditors, that the security upon which they themselves have no claim, should be applied, in or towards payment of a creditor, who otherwise would come in and prove for his whole debt against their debtor's estate in rivalry with them, and diminish, to the extent of the dividend he might receive upon such proof, the fund which is available for their claims.

2. On the other hand, subject to this right of the acceptor to indemnity, the security forms part of the drawer's assets. But it cannot be recovered out of the acceptor's hands, except upon the terms of his estate having been previously indemnified. It is therefore the interest of the drawer's other creditors, that the security should be realized, and the proceeds applied in or towards payment of the bill, in the hands of the billholder,

for this course of proceeding gives the drawer's estate a double advantage—

(1.) The billholder's proof against that estate is either got rid of altogether, or proportionately reduced.

(2.) That estate will have the benefit of any surplus which may remain after payment of the bill.

The billholder thus gets an apparently gratuitous preference, merely because the Court in administering the two insolvent estates, can, by this means alone, secure the interests of their respective creditors.

The following results appear deducible from the above statement, and are (as it will be seen) clearly established by the cases which are hereafter referred to.

1. That the rule can never be applied, unless both drawer and acceptor are insolvent, for so long as either party to the bill is solvent, the billholder will get paid in full.[d]

2. That the rule cannot be applied, merely because both drawer and acceptor are insolvent, unless their respective estates have also been brought under a forced administration.

For the rule proceeds upon the assumption that the contract which was entered into between the drawer and the acceptor is still subsisting at the time of the application of the billholders, and is

[d] Vid. *Powles* v. *Hargreaves*, 3 De G. M. & G. 450, et infra, p. 17.

incapable of being altered by the contracting parties; which would not be the case, until, by means of some forced administration, both those parties had been deprived of the control over their respective estates, and the rights of their respective creditors had become unalterably fixed.[e]

3. That the rule is applicable, not only as stated in the above formula, where the contract for specific appropriation is between the drawer and the acceptor of the bill of exchange, but, more generally, where it is between the parties liable as principal and surety, in respect, either of the bill of exchange, or of the transaction represented by the bill of exchange.[f]

4. That the rule is not applicable unless the billholder has the right of double proof, *i.e.*, the right of proving against the two insolvent estates of the parties who are liable to him, either upon the bill—or upon the transaction represented by the bill—for the full amount of the bill.

It follows therefore that it is absolutely essential that the bill should have been accepted, otherwise there would not be two parties liable to the billholder.[g]

"The right of proof against both estates in respect of the same transaction is essential to the principle of *Ex parte Waring*." *Per L. J. James, Vaughan* v. *Halliday*, 9 L. R. Ch. App. 569.

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[e] *Powles* v. *Hargreaves*, ubi. sup.; *Lambton Ex parte*, 10 Ch. 405, et infra, p. 52; *General S. American Co. Ex parte*, 10 Ch. 635, et infra, p. 53.

[f] *Ackroyd Ex parte*, 3 De G. F. & J. 726, et infra, p. 26; *Smart Ex parte*, L. R. 8 Ch. 220, et infra, p. 31.

[g] *Vaughan* v. *Halliday*, infra, p. 34.

5. That inasmuch as the contract between the drawer and the acceptor contemplates the security being applied in payment of the bill as soon as it matures, so as to prevent the billholder coming for payment, either upon the drawer or the acceptor personally, the Court, while it gives the billholder the benefit of the contract, treats that contract as having been strictly carried into effect; and therefore assumes, that, before the billholder came in to prove against the estate either of the drawer or the acceptor, he had already received, from the proceeds of the realized security, as much of his claim as that security was capable of discharging. He is therefore considered entitled to prove in competition with the other creditors of the respective estates only for the balance (if any) which may still remain due after the realization of the security.

And if (as a fact) he has proved before such realization has actually taken place, his proof is reduced by the amount received from the security, and any dividends paid to him on the excess over the reduced proof must be refunded or brought into account.[h]

6. That the rule is not applicable when the billholder has acquired any interest in the specifically appropriated security by means of some

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[h] *Hobhouse Ex parte*, 2 Dea. 291, et infra, p. 14; *Powles* v. *Hargreaves*, 3 De G. M. & G. 450, et infra, p. 17; *Barned Banking Co. In re*, L. R. 19 Eq. 1; s. c. on appeal, 10 Ch. 198; and see *Prescott Ex parte*, 4 Dea. & Ch. 23.

express agreement between himself and the drawer or acceptor.

In fact, wherever there is privity of contract between the billholder and the parties to the agreement for specific appropriation, the billholder has an independent right of his own arising from the general principle of contract, a right totally distinct from that which he obtains under this rule.

"It has always been most carefully said, that the right of the billholder under *Ex parte Waring* is not a right founded on contract: it does not spring out of the contract; but it springs out of the necessities connected with the administration of the two insolvent estates." *Per Lord Cairns, Banner* v. *Johnston*, L. R. 5 E. & I. App. 174.[1]

It is of course immaterial whether the billholder took the bill with or without notice of the agreement for specific appropriation provided he was neither party nor privy to it.

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[1] Vide *Ex parte Copeland*, 3 Dea. & Ch. 199, et infra, p. 44; s. c. 2 Mont. & A. 177

CHAPTER III.

I NOW proceed to consider the cases to which the rule laid down in *Ex parte Waring* has been applied.

In the first four cases (*Ex parte Perfect* (1830), 1 Mont. 25; *Ex parte Prescott* (1834), 3 Dea. & Ch. 218, 1 Mont. & A. 316; *Ex parte Hobhouse* (1837), 2 Dea. 291; and *Ex parte Brown* (1838), 3 Dea. 91) the rule was applied in favour of bill-holders under circumstances very closely resembling those which existed in *Ex parte Waring*. In all of them there was, as between the drawer and the acceptor, a contract for specific appropriation of particular property in the hands of the acceptor, for the payment of the bills. The bill-holders were neither parties nor privies to the contract, and there was, in the strictest technical sense, a double bankruptcy, as the estates of both drawer and acceptor were being administered by the Bankruptcy Court.

In several of those cases, however, there were points requiring more particular attention.

Thus in *Ex parte Prescott* Sir G. Rose appeared to refer the doctrine of *Ex parte Waring* to the principle which governs equitable assignments; for he says in his judgment (vid. p. 230):—

"When the bills were indorsed by *Evans* (the drawer), he gave to the petitioners (the billholders) of course no more than the legal right of holders; but then they take them, in Equity, with all the equities attaching to the drawer; and by this equitable assignment are entitled to all the benefit of working out their equities; nor does it rest with *Thompson* and *Mildred* (the acceptors), or *Evans*, to set up any objections to those equities. I always understood, that the principle on which *Ex parte Waring* was founded was this,—that when the original intention of the parties was to appropriate property to a certain purpose, in such a transaction, bankruptcy would not affect that intention, nor deprive third parties of the benefit of it."

This view, which confers on the billholders the rights of equitable assignees, appears to have been distinctly repudiated by Lord Eldon in his judgment in *Ex parte Waring*,[k] and has never since been treated as the foundation of the rule.

Again, in *Ex parte Hobhouse*, an attempt was made on the part of the billholders to have the proceeds of the security applied towards the discharge of the bills, without making any proportionate reduction in their proofs against the bankrupts' estates.

This reduction had been directed in the order made in *Ex parte Waring* (vid. *Appendix, infra*), but it was not expressly mentioned in Lord Eldon's judgment, and the case of *Ex parte Hobhouse* was the first formal decision (which has always since been followed) that the billholders could not avail themselves of the benefit of the

[k] Vide supra, p. 3.

rule without consenting to the reduction of their proofs.

In the same case another point was referred to, which had been previously raised in a case of *Ex parte Parr* (1818), Buck, 191.

In that case, which occurred in the same bankruptcy of *Brickwood & Co.*, the drawer had deposited with the acceptors a certain security for the purpose of meeting the acceptances. The drawer and acceptors having both become bankrupt, an application was made by the billholders to have such part of the security as remained in the acceptors' hands applied in discharge of the bills. Evidence was tendered to prove that the acceptors had before their bankruptcy received out of the proceeds of the security, and applied to their own use more than sufficient to satisfy the whole of the bills, and it was urged that, under those circumstances, the acceptors had reaped the full benefit of their security, and the drawer was entitled to have what remained in the acceptors' hands delivered over to him. Sir John Leach, in his judgment, assumed that in *Ex parte Waring* the Lord Chancellor had proceeded entirely upon the idea that *Bracken & Co.* could not have withdrawn the bills without leaving sufficient to satisfy the outstanding acceptances, and that the whole equity in that case consisted in the short bills being specific property, in the hands of *Brickwood's* assignees, to satisfy the acceptances; and he accordingly held in the case of *Ex parte Parr*, that if in fact the billholders had received more

than the amount of their acceptances, they could have no right to pay the acceptances with the security still remaining in their hands. A reference was accordingly directed to enquire whether *Brickwood & Co.* had, at the time of their bankruptcy, any and what lien upon the security in their hands: but there is no report as to the result of such enquiry.

In the case of *Ex parte Hobhouse*, the acceptor, *Glass*, had himself received before his bankruptcy, out of the proceeds of the security deposited by Messrs. *Mundy* (the drawers), about £6000, which he had not applied in discharge of the bills, and his assignees had received since his bankruptcy a further sum of £3150. These two sums together exceeded the amount due on the bills. Sir John Cross, in his judgment (vid. p. 312), adverted to this fact, and after suggesting that the drawers might say to the acceptor—

"You are bound to indemnify us against all the bills to the amount of £6000;" proceeded as follows,—"and after doing this, *Glass's* estate would still be indebted to the *Mundys* in the £3150, subject to providing for the payment of the other bills to that amount. If *Glass* is still liable on the bills to the amount of £6000, that is his own fault, by his misconduct in misappropriating the fund."

These remarks, however, Sir John Cross stated that he offered in the way of suggestion, and not as a judicial opinion, and the case was decided by the Court to be within the rule of *Ex parte Waring;* so far (as it would seem) overruling the previous decision of *Ex parte Parr.* It will be

seen that this point has since been definitely settled by the case of *Ex parte Carrick* (*infra*, p. 23).

Up to this point then, the rule was applied only by the Court of Bankruptcy in the course of its administration of bankrupt estates.

Laycock v. *Johnson* (1847), 6 Hare, 199, 11 Jur. 688, 16 L. J. (Ch.) 350, is the first case in which the consideration of the rule was brought under the cognizance of the Court of Chancery.

In that case there had been, as between the drawer and acceptor of some bills of exchange, a specific appropriation of certain goods as a security to meet those bills. Both drawer and acceptor became bankrupt, and their respective estates were being wound up by the Court of Bankruptcy.

The acceptor had, before his bankruptcy, executed a deed of trust, under which a part of the specifically appropriated property came into the hands of the trustees of that deed; who thereupon instituted a suit in Chancery against the assignees of the drawer and the assignees of the acceptor, for the direction of the Court in the execution of the trust. On the hearing on further directions of this suit, the billholders asserted a right to intervene, and claimed, upon the authority of *Ex parte Waring*, that a fund in Court, the proceeds of the goods deposited with the acceptor, should be applied towards payment of their bills.

V.-C. Wigram, however, held that the billholders had no such right, and in his judgment made the following observations (p. 209):—

"The 3rd question is, whether the doctrine established by *Ex parte Waring*, and the other cases, affects the alleged rights of the billholders. That doctrine appears to me to make no difference for the purposes of the present suit. The creditors must be paid in the bankruptcy; and the rule laid down in *Ex parte Waring* is only a special mode of payment in the bankruptcy. In the case of *Thompson* v. *Derham*[1] I had occasion much to consider what the consequences would be if the Court should take upon itself to administer in Equity the law which applies to the case of bankruptcy alone; and it appears to me now, as it did in that case, that any attempt to administer in Equity the bankrupt's estate, would involve much substantial inconvenience to which parties ought not to be subjected. In truth, to apply the rule expressed in *Ex parte Waring* is merely to adopt a special mode of paying the creditors whose case falls within that rule."

These observations were relied on in the argument in the case of *Powles* v. *Hargreaves* (*infra*) as an expression of the Vice-Chancellor's opinion that the rule of *Ex parte Waring* was merely a technical rule of bankruptcy, and only to be applied where both estates were being administered under the bankrupt law; and *Laycock* v. *Johnson* has been cited as an authority that *Ex parte Waring* does not apply to the administration of a trust in Equity (*see* Seton on Decrees, I. 304).

The words used by the Vice-Chancellor perhaps admit of a wider interpretation, but all that he really decided was, that as the two estates were in fact at the time under the administration of the Court of Bankruptcy, the functions of that Court

[1] 1 Hare, 358.

ought not to be usurped by the Court of Chancery;[m] and it will be seen from the judgment itself, that the Vice-Chancellor did not deny the right of the billholders to the proceeds, but merely left them to assert their claim in the bankruptcy—for he held that the proper decree to be made, was a decree for the payment to the assignees of the acceptor of the balance in court without prejudice to the claim of any persons who were not parties to the record.

All the cases up to this date involved a double bankruptcy in its strict technical sense, but the case of *Powles* v. *Hargreaves* (1853) 3 D. M. & G. 430,[n] carried the doctrine further by holding that the rule was equally applicable where the two estates (though not bankrupt) were actually insolvent, and were being wound up under any forced administration.

That case was as follows:—

G. Hargreaves, J. Hargreaves, and *Thomas Platt,* carried on business in co-partnership, in *Liverpool* as *George Hargreaves & Co.;* at *Manchester,* as *Joseph Hargreaves & Co.;* and at *Shanghae,* in *China* as *Platt, Hargreaves & Co.* The partners purchased through their *English* firms goods for *Prescott,* a customer, which they consigned to their firm at *Shanghae* for sale, the

[m] See for illustrations of this doctrine *Martin* v. *Powning,* L. R. 4 Ch. 356; *Stone* v. *Thomas,* L. R. 5 Ch. 219; *Morley* v. *White,* L. R. 8 Ch. 214.

[n] Reported before V.-C. Stuart, 21 L. J. 238; and s. c. 23 L. J. Ch. 1; 17 Jur. 1083; 22 L. J. 137.

Shanghae firm, with the proceeds purchasing and returning other goods to the *English* firms on *Prescott's* account. It was the custom for the *English* firms or one of them to draw on *Prescott*, for the price of the goods purchased for him, bills of exchange (some for the amount of particular goods, others for goods in general). These bills *Prescott* accepted, upon an agreement that the goods purchased and returned from the *Shanghae* firm should, in the hands of the *English* firms, be a security for and indemnity against the bills so drawn and accepted. In September, 1847, *Prescott* died insolvent (though he had not been so declared by bankruptcy or any legal process) and administration was taken out to his estate and effects. In November, 1847, the co-partnership became bankrupt, but subsequently, by an arrangement, the bankruptcy was superseded, and a composition deed executed, which contained a proviso to the effect that all the rights of the creditors of the co-partnership upon bills of exchange, drawn by the partners, were to be reserved, and that their rights to participate in the composition were to be decided according to the law as administered in bankruptcy in *England*. Certain goods, which had been purchased in *China* on *Prescott's* account in return for goods shipped abroad for him, had reached the hands of the trustees of the composition deed, and had been sold by them for the sum of £8,040.

The suit was instituted by *Powles*, a registered public officer of the *Liverpool Banking Company*,

(who were holders of three of the bills), on behalf of that company, and of all other the holders of bills of exchange drawn by *George Hargreaves* and *J. Hargreaves*, or one of them, upon and accepted by *Prescott*, as plaintiffs, against the *three partners*, the *administratrix of Prescott*, and the *trustees of the composition deed* as defendants—claiming to have the sum of £8,040 applied in part discharge of the amount due on the bills. It was argued that the rule of *Ex parte Waring* was inapplicable on two grounds—(1) That there was not strictly speaking a double bankruptcy, and (2) that the securities in the hands of the depositees were insufficient to meet the whole of the demand; but it was held by Lord Chancellor Cranworth and Knight Bruce and Turner, L. JJ., that the billholders were entitled, on the principle of *Ex parte Waring*, to have the sum in question divided rateably amongst them in proportion to the amounts due on the respective bills, without prejudice to their right to make such claim for the balance as they might be entitled to under the composition deed.

As to the 1st ground, Lord Cranworth in his judgment (p. 450) expresses himself thus:—

"But then it is said that there is no bankruptcy as far as *Prescott* is concerned. There was not, it is true, a judicial bankruptcy, but why is it that this principle is said to be only applicable when there are two bankruptcies? Why, because if either party (the principal or the surety) is solvent, there is no room for the application of the principle at all. In such a case no question can arise between the billholders and those who are liable upon the bills.

The billholder gets paid in full, either by the principal or the surety; if he gets paid in full by the principal, of course he does not apply to the surety. The principal then applies to the depositee, the surety who holds the securities, and says, I have paid off all this against which the deposit was made with you by way of indemnity; I have therefore put myself in a position to demand the securities back again. So, also, if the principal is insolvent, and the depositee is solvent, the question does not arise, because the billholder then comes on the depositee. It is no answer for him to say he was only surety; if he is solvent he pays in full, but then he clearly has a right to indemnify himself by means of the deposit as far as it will extend. Therefore it is in a sense quite accurate to say that such questions arise only in the administration of two bankrupt estates; the question can alone arise where there are two estates, that of the principal and surety, both insolvent, and coming therefore under a forced administration. But whenever that state of things does arise, and whenever two estates are to be administered by some *vis major*, it is perfectly immaterial whether such administration is to be under the jurisdiction of the Court of Chancery, or of the Courts of Bankruptcy, or Insolvency; exactly the same principle becomes applicable. If it were not so, the strange anomaly would arise that the property of the depositor, instead of going as it ought to pay his debts, would actually be applied in payment of the debt of the depositee. It appears to me, therefore, obvious that if *Lord Eldon* did use any expression that could lead to the inference that there must be two distinct bankruptcies before the principle was applicable, it was only because bankruptcy was then in his contemplation, not that he meant that it should be technically bankruptcy. As I have said, there must be an administration of two estates, both insolvent, before this equity of persons who have no distinct equity of their own, but which is enforced through the medium of the equity of other parties can by possibility arise. It appears to me that state of things did arise here. In the *Messrs.*

Hargreaves' Case there was clearly what must be treated in every respect as actual bankruptcy; and in regard to *Prescott's* estate there is virtually the same thing; at the time of his death his estate was totally insolvent; it must, therefore, be regarded just in the same light as that of a certificated bankrupt; and all the equities attaching on it must be carried into effect, just in the same way as if it was an estate administered in the course of the process of bankruptcy or insolvency, or in any other mode of administering an insolvent estate."

The judgment of Lord Justice Turner upon the same point (p. 458) contains the following:—

"Then it is said it is necessary that there should be two bankrupts, or two bankrupt estates, in order to bring into action the rule laid down in *Ex parte Waring*. The answer to that argument is, that there are in truth one bankrupt and one utterly insolvent estate, and it can make no difference in the application of the rule that the one estate is to be administered in bankruptcy, and the other is an insolvent estate, to be administered through the medium of the Court of Chancery. The principle on which this rule is founded appears to me to be this. There are two parties liable on the bills of exchange. One of those parties holds securities for the payment of the bills. The other party has a right to insist that the property held as security shall be applied to the payment of the bills. He may sue in equity for the purpose of enforcing that right. If he does, the security must be applied accordingly. It cannot be applied for the benefit of the general creditor of the party who is bound to indemnify, because the party who is to be indemnified has a right and an interest in the application of it to the indemnity which he has stipulated for; and the consequence therefore is, that the proceeds of it must be applied, not to the general creditors of the party who is indemnified, but to the demand which is indemnified against. It seems to me that this principle must equally

apply whether there are two estates to be administered in bankruptcy, or one in bankruptcy and one in the Court of Chancery."

As to the 2nd point, Lord Cranworth, after adverting to the case of *Ex parte Waring*, says (p. 452):—

"It was said that such an equity could not be applied in this case, because here you cannot take the goods which were deposited out of the hands of the depositees without indemnifying them, that is, without paying the bills in full, which, if (as in the present case) the deposits are insufficient for the purpose, is not to be contemplated. I confess I was at first a good deal struck with that argument. With the view of ascertaining exactly what was done in *Ex parte Waring*, and whether the order as drawn up in that case would throw light upon the subject, we sent for the order itself. It may, I think, be inferred from the judgment in the report of that case, that the securities deposited were more than sufficient to satisfy the bills. I do not know that that distinctly appears in the report, but whether it was so or not is immaterial, because the order[*] itself (which I must assume was very fully considered, for *Lord Eldon* directed the attention of *Mr. Cooke* to the mode in which it was to be drawn up) distinctly provided for the case of the short bills deposited either being equal or more than sufficient, or being insufficient; and expressly provided that, if insufficient, the parties holding the acceptances were to prove for the deficiency. Is that at all surprising when we consider the case a little more closely? That of necessity must be the equity; because when, as in the present case, the goods were deposited under circumstances that the parties with whom they were deposited had a right to hold them as security, it is to be observed that from the nature of the transaction, it was meant either by express contract, or in the ordinary course of dealing

[*] Vid. Appendix, infra.

with the property, that it should be turned into money; when that is done it is absurd to speak of holding £8,000 by way of security for being paid £16,000. That is not the course of dealing. When it is once said that goods or bills are deposited by way of security on a contract that, when the proper time arrives, those securities are to be realized and turned into money, what is necessarily meant is, that the money is then to be applied, just as property sold under a power of sale in a mortgage is to be applied, in liquidating the demands for which it is a security if sufficient; if not sufficient, in liquidating such demands *pro tanto*."

Powles v. *Hargreaves* is therefore a distinct authority (1st) that the rule in *Ex parte Waring* applies where the estates of both the parties liable on the bills are in the course of an administration, whether under the direction of a Court or not, which has unalterably fixed the rights of their respective creditors,[p] and (2ndly) that it is immaterial for its application, whether the value of the specifically appropriated security be less or more than the amount of the bills, but that if it be less, the billholders are entitled to prove for the balance.

In the case of *Ex parte Carrick* (1858), 2 De G. & J. 208, there being a specific appropriation, as between drawer and acceptor, of certain securities by the former to cover the liability of the latter on the acceptances, and the estate of the acceptors being wound up in bankruptcy in *England*, and that of the drawers in *Canada* under proceedings

[p] See on this point, supra, p. 8, and judgment of L. J. James, in *General S. American Co.*, p. 54, infra.

analogous to bankruptcy, the billholders were, upon the principle of *Ex parte Waring*, held entitled to have the securities remaining in the hands of the acceptors at the time of their bankruptcy applied towards discharge of their bills; their proofs being reduced to that extent.

In this case, a point arose, similar to that which was raised in the cases of *Ex parte Parr*, and *Ex parte Hobhouse;* for the acceptors had, before their bankruptcy, received from the drawer securities more than sufficient to cover the liability on all their acceptances, but, instead of employing those securities for the purpose for which they had been deposited, they had realized a considerable part of them, and applied the proceeds to their own use, and upon their bankruptcy, there remained in their hands securities to the amount of about £43,000 to meet acceptances to the amount of £126,616 18*s.* 4*d.*

Under these circumstances, it was urged on the part of *Mr. Burstall* (the drawer), that the rule of *Ex parte Waring* would not apply, for that the acceptors, by their misapplication of part of the indemnity fund, had forfeited their equity to indemnity out of the remainder, and that the claim of the billholders which depended upon that equity fell with it; and it was therefore contended, that the drawer had a right to stop the £43,000 until the acceptors had made good so much of the proceeds of the security (in the case called cargo bills) as they had improperly realized.

Lord Justice Turner, however, in his judgment,

after noticing the fact of the misappropriation, proceeded as follows (p. 216):—

"Now, in the first place, these cargo bills were placed in the hands of the bankrupts for the purpose of paying the bills accepted by them for *Mr. Burstall*, and therefore the application of them towards the payment of the £126,616 18s. 4d. is according to the original trust on which they were placed in the bankrupt's hands. To apply them otherwise would be in truth to vary, in some degree, the original trust on which the bills were sent to the bankrupts, and to create a new equity and a new right in favour of *Mr. Burstall*, different from the purpose for which the bills were originally placed in their hands. How is this new right to arise? It can only arise upon the bankruptcy of *Harrison, Watson, & Co.* (the acceptors). But that bankruptcy entirely put an end to the trust. The relation which had subsisted between *Harrison, Watson, & Co.* and *Mr. Burstall* was determined and brought to a point by the bankruptcy, and at that point the rights and liabilities of the parties were to be ascertained, and the debt and credit must be fixed at the period of the bankruptcy. It is now proposed to keep alive the indemnity for the purpose of which the bills were originally placed in the hands of *Harrison, Watson, & Co.*—to keep it alive upon new rights arising on the bankruptcy. I think that this cannot be done. It seems to me that the application of the cargo bills towards the payment of the billholders is all that can be required on the part of *Mr. Burstall*, and that the rest must be matter of proof between the estates, as to which I say nothing whatever. It may be an important and a difficult question what proofs are to be made between these two estates, and I think that the question before us ultimately will resolve itself into a question of proof between the estates, and not into the right contended for on the part of *Mr. Burstall*."

It would appear from the report of this case that

the cases of *Ex parte Parr* and *Ex parte Hobhouse* were not cited in the argument; but the decision is a distinct authority against the view expressed in those cases by *Vice-Chancellor Sir J. Leach* and *Sir J. Cross*.

In the case of *Ex parte Ackroyd* (1860), 3 De G. F. & J. 726, a trader, in pursuance of an agreement, delivered to a firm several acceptances and a quantity of wool, and procured bills drawn by the firm to be accepted by strangers on his indemnity, and made payments on account of the firm. The affairs of the trader and the firm were being wound up under arrangements analogous to the bankruptcy law.

Lord Justice Turner having, upon an examination of the evidence, satisfied himself that, as between the trader and the firm (the parties ultimately liable to the billholders), the wool had been specifically appropriated to meet those bills, held that the billholders were entitled rateably to the proceeds of the wool.

This case (though the facts were somewhat complicated) did not carry the rule further, the only point deserving of special notice being that the party depositing the security was not (as in the previous cases) directly liable on the bills either as drawer or acceptor, but was liable in respect of the transaction represented by the bills, as he had agreed to indemnify other parties against all liability on their acceptances in favour of the drawer.

In the case of the *City Bank* v. *Luckie* (1870),

L. R. 5 Ch. App. 773,[q] another step in advance was made, for there the rule of *Ex parte Waring* was held to apply, where the property was specifically appropriated, not to meet any particular bills of exchange, but for the purpose of securing a cash credit, under which the bills in question were drawn and accepted.

In that case an estate had been mortgaged by *Luckie* to *Kynaston & Co.* to secure a certain cash credit which the latter had agreed to grant to the former, and under which bills to the amount of £12,500, were drawn by *Luckie* upon and accepted by *Kynaston & Co.* There was also a current account between the two firms.

Luckie and *Kynaston & Co.* both became insolvent in the year 1866, and executed deeds of inspectorship. Some of the bills were in the hands of the City Bank, who commenced a suit, on behalf of themselves and the other billholders, against *Luckie* and the partners in *Kynaston & Co.*, praying a declaration, that they and the other billholders were entitled to the benefit of the mortgage for the payment of the sum due upon the bills.

In the Court below, Vice-Chancellor Stuart decided[r] against the plaintiffs, on the ground that, for the application of the rule of *Ex parte Waring*, it was necessary that the security claimed should

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[q] 23 L. J., N. S., 376.

[r] The judgment of the Vice-Chancellor is reported in a note to the case in L. R. 5 Ch. 774.

be by contract connected with the transaction upon the bills, and that it was impossible to connect a general mortgage for the cash balance that might be due from time to time, with the particular bills of exchange which happened to be unpaid.

On appeal, this decision was reversed by Lord Hatherley (L.C.), who said (p. 777):—

"It is said, however,—and this seems to have been the view of the Vice-Chancellor in the Court below,—that the security is only for the balance of a cash account. It seems to me utterly immaterial what is the form which the debt assumed, if, amongst other things, you find upon investigating the account, that the creditor who claims the balance of the cash account has pledged his credit for the purpose of having that cash advanced which he seeks to be paid. It is a cash advance in whatever way it be advanced, and in effect cash was advanced upon the security of *Kynaston & Co.*; and *Kynaston & Co.* being the persons who have thus made themselves liable, and taken this mode of advancing the money, cannot be called upon to part with the securities until they have been completely indemnified."

The decree accordingly declared, that the property comprised in the mortgage was a security for indemnifying *Kynaston & Co.* against the payment of the bills of exchange on which advances were made to *Luckie* by *Kynaston & Co.* when such bills arrived at maturity; and that the plaintiffs and the other billholders were entitled to the benefit of such security, and to have the same applied in payment of the bills in order to indemnify *Kynaston & Co.*, and were also entitled

to participate therein rateably in proportion to the amounts due to them in respect of their respective bills. And the decree then went on to reserve the right of the billholders to prove against the respective estates for the balance remaining due to them, and provided for the reduction of the proofs, if already made, beyond the extent of such balance.

It might seem at first sight from the headnote in *Levi & Co.'s case* (1869), L. R. 7 Eq. 449, as if that case (in which the rule of *Ex parte Waring* was held not to apply) was at variance with the above case of *City Bank* v. *Luckie*, but upon examination it will be found that the two cases are really consistent with each other.

This headnote is as follows:—

"L. deposited certain securities with a company upon an agreement that the company might sell them, and apply the proceeds in reimbursing themselves any money owing by L. to them. Subsequently the company accepted bills for L.'s accommodation. Afterwards, before the bills were paid, the company went into liquidation, and L. made an assignment for the benefit of his creditors. The only liability of L. to the company was in respect of these bills:—

"*Held*, that *Ex parte Waring* did not apply, and that neither the billholders nor L. were entitled to have the proceeds of the sale of the securities applied in payment of the bills."

Upon the facts of the case, however, it will be seen that there was no specific appropriation of the particular property to meet the particular credit, under which the bills were drawn and

accepted, for the bills, upon which the claim in *Levi & Co.'s case* was made, were drawn and accepted under a credit dated in the year 1866; whereas the property claimed by the billholders was specifically appropriated for the purpose of meeting bills, drawn and accepted under a different credit dated in the year 1865, and also for the purpose of securing monies owing by the depositor on general account. Accordingly, all the acceptances under this latter credit having been satisfied, the decision of the Master of the Rolls, that the property was to be applied to the general account (under which *Levi & Co.'s* liability on these bills fell), was merely carrying out the intention of the parties to the contract.

In the case of *Bank of Ireland* v. *Perry* (1871), L. R. 7 Exch. 14 (which was a special case stated on an interpleader issue), the plaintiffs were holders of a bill of exchange which had been drawn upon and accepted by the defendant upon an agreement between himself and the drawers that the proceeds of a certain cargo should be applied for the specific purpose of taking up the bill at maturity. The drawers' estate was being wound up under an inspectorship deed, and that of the acceptor, under a deed of composition, and the plaintiffs had proved against both estates. The question before the Court was, whether the plaintiffs were entitled to have the balance of the proceeds of the cargo, which remained in hand, applied towards discharging the bill, and their claim was allowed. Kelly, C. B., appears to have

decided the case upon the assumption that the money was clothed with an equity in favour of the plaintiffs,[s] but at the same time added, that though he did not base his decision upon the authority of *Ex parte Waring* and *Powles* v. *Hargreaves*, he thought the plaintiffs would in all probability have been entitled to recover it on the authority of those cases.

Cleasby, B., in giving judgment (p. 20), said:—

"The case has been presented to us sitting as a Court of Equity, and we are asked to say that in Equity the plaintiffs have a right to the money in dispute. Whether they have or not depends mainly on *Ex parte Waring* and the cases which have followed that decision;"

and then, after stating the rule in *Ex parte Waring*, and saying that he considered *Powles* v. *Hargreaves* as exactly in point, proceeded—

"It is impossible for us to do anything but act on those authorities, and there having been nothing, in my opinion, to get rid of the original contract by which the proceeds of the cargo were bound, we must say that the balance ought to be applied in part satisfaction of the bill."

In ex parte Smart (1872), L. R. 8 Ch. App. 220, the circumstances of which were analogous to those in *Ex parte Ackroyd* (though from the report that case does not appear to have been referred to), it was decided, that although the person depositing the specific security was not

[s] But see as to this, supra, p. 12.

[t] Reported before Bacon, C. J., 20 W. R. 968; s. c. L. J., N.S., 146.

himself a party to the bills, the rule of *Ex parte Waring* would apply, as he was by virtue of the agreement between himself and the depositee, liable in respect of the transaction which was represented by the bills.[u]

This case also advanced the rule a step further, for it was held to be applicable, though the bill-holder was himself the drawer, and therefore had not a right of double proof upon the bill itself, provided he had what was equivalent to a right of double proof—viz., a right of proof against one of the insolvent estates upon the bills themselves, and against the other of the insolvent estates upon the debt which was represented by the bills.[v]

The facts of this case were as follows:—*Langs & Co.*, merchants in *Bremen*, employed *Richardson* as their correspondent in *London*, and *Stephani & Co.* as their correspondents at *Havanah*; *Stephani & Co.* were in the habit of buying goods from *Langs & Co.*, and for the price of such goods *Langs & Co.* drew bills on *Richardson*, who accepted them for the accommodation of *Stephani & Co.*; *Stephani & Co.* sent remittances in short bills to *Richardson*, specifying the bills which the remittances were intended to meet. *Stephani & Co.* suspended payment, and their estate was being wound up according to the law of *Havanah*, and upon *Richardson's* petition for liquidation of his affairs, *Smart* was appointed his

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[u] 3 De G. F. & J. 726, et supra, p. 8.

[v] Supra, p. 8.

trustee, at which date some of the short bills were in *Richardson's* possession.

Upon the petition of *Langs & Co.*, who were the holders of the acceptances of *Richardson*, it was held that they were entitled to have the remittances remaining in specie applied towards the discharge of the particular bills which they were intended to meet.

In his judgment, Lord Justice James says (p. 225):—

"*Stephani & Co.* had a right to say that the bills should not be applied for the general purpose of paying *Richardson's* creditors, but for the specific purpose for which they were intended; and, on the other hand, they had no right to leave *Richardson's* estate liable to pay his acceptances.

"Accidentally another person gets an advantage for which he had not stipulated, by reason of the adjustment of equities between the parties. It is said that we ought not to extend the doctrine of *Ex parte Waring*, but the rule laid down in that case has been often before the Court, and neither the Court nor the Legislature has shewn any disapproval of it.

"We are not really pressing it further. I cannot follow the argument that has been urged upon us, that the doctrine only applies where all parties are parties to the same bills, and does not apply to a case where there are distinct contracts. In truth the contracts which the holder makes with the drawer and acceptor of a bill are really distinct contracts; but it does not appear to me that the decision in *Ex parte Waring* depends on any such connection between the parties. The reason of the decision is, that the equity cannot be worked out without the application of such a rule."

And Lord Justice Mellish, after saying that there was, as between *Stephani & Co.* and

Richardson, a specific appropriation of the remittances to meet the acceptances, proceeded (p. 226):—

"Then does the doctrine of *Ex parte Waring* apply? If *Messrs. Stephani* had drawn the bills themselves, and endorsed them to *Langs & Co.*, it would clearly have been within the rule. Does it make any difference that they got *Langs & Co.* to draw for them to meet the debt; so that the only difference was, that if the bills were dishonoured, instead of *Langs & Co.* having a remedy on the bills against *Messrs. Stephani*, they could only bring an action for the value of the goods? I think the same difficulty arises as in *Ex parte Waring;* and there is no way of adjusting the equities between the parties except by applying the bills to meet the particular acceptances to which they were appropriated."

In the case of *Vaughan* v. *Halliday* (1874), L. R. 9 Ch. App. 561, which will be found cited *infra* (p. 49), Lord Justice Mellish in giving judgment explained the *ratio decidendi* in the case of *Ex parte Smart* as follows (p. 568):—

"It is true we did, in *Ex parte Smart*, in one respect carry the doctrine of *Ex parte Waring* further than it had been carried in any previous case; for I think that in all the previous cases the claim had been by a holder of a bill who had a right of double proof against the acceptors and the drawers. In *Ex parte Smart* the holder was himself the drawer, and although he was not entitled to prove on the bill against the two firms, he was entitled to prove against the acceptor, who had accepted for the accommodation of a firm to whom the drawer of the bill had sold goods, and he was entitled to prove for the same debt against that firm for goods sold and delivered. There being, therefore, a double insolvency and a double right of proof, we thought that the principle of *Ex parte Waring* applied."

In the case of *Ex parte Dewhurst* (1873), L. R. 8 Ch. App. 965, s. c. 21. W. R. 874, an attempt was made to exclude the operation of the rule of *Ex parte Waring* on the ground that the drawer and acceptor of the bills were two firms engaged in a joint adventure[w] for buying and selling goods.

A firm in *Bombay* drew bills upon a firm in *England* for the purposes of a joint adventure between them, discounted these bills, and with the proceeds purchased cotton, which they consigned to the *English* firm for the specific purpose of meeting the acceptances. Upon both the firms going into liquidation, it was held on appeal from one of the Registrars in Bankruptcy, by Lord Justice James (p. 968), that the billholders were entitled to the benefit of the rule in *Ex parte Waring*, but not so as to deprive the joint creditors of the aggregate of the two firms of their rights to be paid their debts out of the aggregate estate; and he accordingly directed the order of the Registrar to be varied by declaring—

"That the right of the billholders is subject to the rights of the joint creditors (if there are any) of the aggregate of the two firms to have the proceeds of the consignments of cotton applied as part of the aggregate estate."

In the case of *In re Barned's Banking Company* (1874), L. R. 19 Eq. 1, affirmed on appeal L. R. 10 Ch. App. 198, an attempt was made on the

[w] See *Imbert Ex parte*, 1 De G. & J. 152; 29 L. J. 169, where the drawing and accepting houses were identical.

part of the billholders while retaining the proceeds of a security upon the principle of *Ex parte Waring*, to avail themselves of the rule in Chancery,[x] under which a secured creditor was entitled to prove for the whole of his debt, and at the same time to realize his security—that rule having been held in *Kellock's case* (L. R. 3 Ch. App. 769) to be applicable in the winding-up of a company under the Companies' Act, 1862.

The application was made in this case by the *Joint Stock Discount Company*, in the winding-up of the Banking Company, that the former company might be allowed to receive from the liquidators of the latter dividends on the full amount of the proofs in respect of bills in their hands without reducing such proof by the amount already received (under the rule of *Ex parte Waring*) from a security appropriated to meet those bills, and it was contended that upon the authority of the cases of *Mason* v. *Bogg* and *Kellock's Case* (*ubi supra*) they were so entitled.

Sir G. Jessel, M.R., however, dismissed their application, and his decision was affirmed on appeal.

In his judgment, after commenting on the case of *Ex parte Waring* and the order made thereon,

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[x] *Mason* v. *Bogg*, 2 My. & Cr. 443; which rule, however, is to a great extent superseded by the rule in Bankruptcy, 38 & 39 Vict. c. 77, s. 10; but from the judgment it will be seen that the principle of *Ex parte Waring* is independent of either one rule or the other.

he proceeded to explain the principle of the case as follows (p. 9):—

"The equity he (*Lord Eldon*) administered was this: he treated it as if the securities had been realized at the moment of bankruptcy, disregarding the fact that by the nature of the case they were not realized until some time afterwards; he held that at the moment of bankruptcy the amount arising from the security so realized ought to have been paid over to the billholders; and he treated the case as if the proceeds of the security had been actually so paid over, and therefore the billholders ought to have proved for so much less; and on that ground he reduced their proofs, and made them take so much less. That seems to be the view he took. I cannot understand his order in any other view, because if those were payments after proof, there is no principle on which you could reduce the proof and take back the dividends. But if *Lord Eldon* took the equitable view, that the mere realization of the security was an accident, and that you must treat the case as if the security had been sold or realized at the moment of the bankruptcy, the whole thing becomes intelligible. He orders the proceeds to be applied as they ought to have been applied, and he treats the proofs as reduced *ab initio*. That appears to be the same view as was taken of the nature of the securities in the two cases of *Coupland's Claim* (L. R. 5 Ch. App. 167), and *Banner* v. *Johnston* (L. R. 5 E. & I. App. 157).

"Those cases do not bear directly upon this case, because in them the decision turned only on the interpretation of written instruments; in both, however, it was held that the moneys received from the realization of securities for bills are to be applied in the first instance in the payment of the bills; and, further, that these moneys are to be treated as so applied *eo instanti* the bills become due; so that there never ought to be a proof for anything beyond the difference. That seems to me to reconcile the authorities."

Then with regard to the point more particularly urged, *viz.*, that the billholders being, as they called themselves, "secured creditors," were within the rule in Chancery of *Mason* v. *Bogg*, he said as follows (p. 13):—

"It (the security claimed by the billholder) is not a security to him; if it had been a security to him, he must in bankruptcy have deducted it from the proof in the first instance. Then it is not a payment after proof; for there can be nothing better settled in bankruptcy, and no rule less open to dispute, than that payment by a third party after proof does not reduce the proof—still less can it make the creditor pay back the dividend. . . . . The real contract is to apply the moneys arising from the security in the first instance, and at a period at which they ought to have been applied—that is, at the period when the bill becomes due—in payment of the bill *pro tanto*. Therefore a creditor who comes in to take advantage of the rule in *Ex parte Waring* as billholder, must take the rule as he finds it, that is, must apply the proceeds at that particular time in reduction of the amount of his bills: consequently he never ought to have proved for more than the difference, and if he could not help it, because at that time the security was not realized, and he did not know the amount for which he ought to have proved, then, when the amount is actually ascertained and paid to him, the proof ought to be reduced, and if he has received the dividends the dividends ought to be paid back according to the order made in *Ex parte Waring*."

The Lords Justices, in affirming this decree of the Master of the Rolls (L. R. 10 Ch. App. 198), adopted precisely the same view.

Lord Justice James says (p. 200):—

"The case of *Ex parte Waring* decided that a billholder is entitled to the benefit of the security upon these terms—

that the security is to be applied *ab initio* in reduction of the debt from which he gets by good fortune this benefit. That is what was done in *Ex parte Waring*, and in every one of the other cases. The Master of the Rolls says, in effect, in this case: 'If I apply *Ex parte Waring* for the benefit of the billholder, the billholder must take it with the limitation and under the conditions expressed in the order in *Ex parte Waring*, that is to say, the security is to be considered as having been applied in the first instance.' I have no disposition myself to give a billholder any further benefit from that than he has already obtained under it."

And Lord Justice Mellish (*ibid.*):—

"I am entirely of the same opinion. It appears to me that if any other rule prevailed, we should be taking away from the persons who really owned the security the value of it. As it is, they only get it very imperfectly, but still, to a certain extent, they do get it by the diminution of the sum which may be proved against the estate. If it were not to be diminished, it might wholly, in some cases, be given to the billholder, and taken away from them altogether. It is entirely a question, as the Master of the Rolls says, turning upon the terms on which the Court will allow the billholders to have the proceeds of the security. I am clearly of opinion they ought only to be allowed to have it upon the terms of the proof being reduced."

In Loder's Case (1868), L. R. 6 Eq. 491, it had been held by Lord Romilly, M.R., that the rule of *Ex parte Waring* did not apply, but upon grounds which would appear to be irreconcileable with the preceding case.

The facts of that case were as follows:—

Company A. guaranteed bills of exchange for £35,000, which were accepted by *Company B.*,

and *Company B.* assigned to *Company A.* certain property as security for the payment of the bills. Both companies were being wound up by the Court, and the billholders who had discounted the bills, without notice of the security, proved against both estates for the whole amount of the bills, and received from the one estate a dividend of 3s. in the £, and upon the other estate a dividend of 12s. in the £, the aggregate amount of such dividends being £26,250.

The security was afterwards realized and produced £23,500.

A doubt was suggested in argument whether one of the estates might not ultimately turn out solvent, in which case the rule of *Ex parte Waring* would of course have had no application;[y] but Lord Romilly declined to enter into that question and said :—

"The fact is there has been more paid to the billholders than the amount of the security, which really disposes of the whole matter, and therefore they are entitled to nothing more. I hold that *Ex parte Waring*, and all that class of cases, in which *Lord Eldon* laid down the law very distinctly, amount to nothing more than this, that where there is a double bankruptcy, or insolvency if you please (I am not at this moment entering into the question whether the rule is restricted technically and specifically to bankruptcy or not), and there are bills which one bankrupt is entitled to claim against the other that must be set right as between the two estates, the consequence of which is, that the billholders, though they get the benefit of any security

[y] *Hickie's* case, L. R. 4 Eq. 226, et infra p. 44; and see p. 7, supra.

that has been given for the bills, as *Lord Eldon* says, indirectly, have no species of right to the security itself, and that, in my opinion, is the effect of all these decisions."

But I submit that if both estates were in fact insolvent, the rule of *Ex parte Waring* ought to have been applied. According to the principle laid down in *Barned's Banking Company*, the billholders would be considered to have received £23,500, the proceeds of the security, before making any proofs against the estates, and therefore their right of proof against each estate would have been only for the balance, viz.: £11,500. From the proofs upon such balance they would have received from the one estate a dividend of £6,900, and from the other estate a dividend of £1,725, together £8,625, which sum, added to £23,500, amounts to £32,125, the total sum to which, consistently with the rule of *Ex parte Waring*, they would at the date of the decision be entitled. But as in fact the billholders had proved *before the security was realized*, and from such proofs had received £26,250, if as a matter of account they were allowed to retain that sum, they would still be entitled to an additional sum of £5,875, which ought to have been handed over to them out of the £23,500 then available for distribution, leaving them still entitled to receive any further dividend which might be declared in respect of the reduced proofs of £11,500.

I have now gone through the cases in which the rule of *Ex parte Waring* has been held to apply.

It will be observed that in all of them there has been at least one bankruptcy, or proceedings analogous to bankruptcy, and no actual case has occurred in which the rule has been applied when both the parties liable in respect of the bills of exchange had died insolvent, and their respective estates were being wound up, either under the administration of a Court, or by their respective personal representatives.

There appears, however, to be no reason why the rule should not equally apply in such a case.

It will be remembered that in *Powles* v. *Hargreaves* (3 D. M. & G. 430) one of the two parties to the bills had died insolvent, and his estate was being wound up by his personal representative out of Court. In that case it has been considered that Lord Justice Turner expressed a doubt (*see* p. 457) whether the rule of *Ex parte Waring* would apply where none of the parties were bankrupt. Such doubt, however, if it ever existed, cannot be said to exist at the present day. *See In re Barned's Banking Company*, L. R. 19, Eq. p. 7, where Sir G. Jessel, M. R., says :—

"It has not been disputed at the bar, and in fact it has been admitted, that that doctrine does apply to a case where all parties to a bill are insolvent, although none of them may be bankrupt. I have not therefore to consider the question which was thought doubtful by *Lord Justice Turner* in *Powles* v. *Hargreaves;* though, if I had to consider it, I should treat the judgment of *Lord Chancellor Cranworth* as conclusive on the point."

And again (p. 10)—

"*Lord Chancellor Cranworth* took a general view, which is the view, at all events, presented by the counsel for the applicants, and appears to be the correct view, namely, that the doctrine has a wider application than bankruptcy, that it applies to every case where all the parties to a bill are insolvent, and is an equity to be administered for the reasons which *Lord Eldon* puts so forcibly, viz., that in order to put matters in the right position as between the original giver and receiver of the security, you must apply the proceeds of the security to the payment of the bills, not for the sake of the billholder, not as a kind of security to him, but as a mode of working out the equities between the insolvent estates of those two original parties to the security."

CHAPTER IV.

It remains to notice several cases in which the rule of *Ex parte Waring* has been discussed, but has been held inapplicable from the absence of one or more of the conditions which have been pointed out as necessary for its application.

In the case of *Ex parte Copeland* (1833), 3 Dea. & Ch. 199,[s] the rule was held not to apply, because the billholder had himself entered into a contract with the owner of the goods—having discounted the bill upon the faith of an undertaking by the drawer that the goods in the hands of the acceptor should be applied to liquidate the bill, of which undertaking he had given notice to the acceptor.

Here Erskine, C.J., held that the rule of *Ex parte Waring* never came into discussion, as there was privity of contract between the billholder and the parties to the bill.

In *Hickie & Co.'s Case* (1867), L. R. 4 Eq. 226, there was no sufficient evidence of double insolvency.

In this case the acceptor was a Company which

[s] S. C. 2 Mont. & A. 177.

was ordered to be wound up under the *Companies Act*, 1862, and it was held by Lord Romilly, M. R., that the rule did not apply upon the ground that though the drawer's estate was clearly insolvent, the insolvency of the acceptor was not proved, as an order to wind-up a company is not necessarily a proof of its being insolvent.

The application of the billholders, however, to receive payment out of the proceeds of the specifically appropriated security, was ordered to stand over till it was ascertained whether the company was solvent or not, and these proceeds were in the meantime ordered to be ear marked, and not dealt with without notice to the billholders.

Though the above was the ground on which the Master of the Rolls based his decision, he seems to have considered that the mere fact that the drawer's estate was indebted to the acceptor's beyond the amount of the bills was sufficient to exclude the operation of the rule of *Ex parte Waring*, and adopted the argument that the drawer, inasmuch that there would be nothing owing to him after payment of the bills, had no right to interfere with the application of the securities he had deposited (p. 231).

"If therefore," he said, "on taking the account between the bankers, the *New Zealand Corporation*, and the depositors, *Hickie & Co.*, the balance is against *Hickie & Co.*, and in favour of the *New Zealand Corporation*, it would appear to me that the produce of the securities would be part of the assets of their firm and distributable *pari passu* among all the creditors."

It is submitted, however, that such a mode of dealing with the proceeds of the securities would be at variance with the rights stipulated for by the respective parties to the contract for specific appropriation (viz., that the property comprised in it should be applied in the *first instance* for the particular purpose for which it was deposited);* rights which were not destroyed by the insolvency of those parties, but were merely transferred to their respective creditors. For the suggested distribution of the whole of the proceeds amongst the acceptor's creditors (irrespective of the prior payment of the bills of exchange) would have really had the effect of causing what *Lord Cranworth*, in *Powles* v. *Hargreaves*, calls the strange anomaly, viz.:—

"Property of the depositor instead of going to pay his debts would actually be applied in payment of the debts of the depositee."

The three following cases, *Trimingham* v *Maud*, *Levi's case*, and *Ex parte Alliance Bank*, show that it is not sufficient for the application of the rule that there should be a subsisting security between the parties liable on the bills unless the security were specifically appropriated to meet the particular bills, or the credit under which the bills were drawn, or the debt represented by the bills.

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* See judgment of V.-C. Page Wood, *Inman* v. *Clare*, Johns. 781.

In the case of *Trimingham* v. *Maud* (1868), L. R. 7 Eq. 201, 38 L. J. (N.S.) 207—

A firm in *Barbados* was in the habit of drawing bills upon a *London* firm and sending remittances to *London* to keep the *London* firm in funds to meet their acceptances, the amounts being carried into general account. The two firms were insolvent, and were being wound up. At the time the *London* firm stopped payment they were under acceptances for the *Barbados* firm to the amount of £25,000, and after their stoppage drafts arrived in *London* for their acceptance (which were not accepted), to the amount of £16,000, and remittances arrived to the amount of £12,000.

Vice-Chancellor Giffard was of opinion upon the evidence, that there being no specific appropriation of remittances to meet the bills as between the two firms, the *London* firm had the power, so long as they were solvent, of dealing with the remittances as they pleased, but that upon their bankruptcy that power ceased, and the remitting firm had a right then to insist that the remittances which still remained in specie should be appropriated for the purposes of the general account between the two firms, and not as part of the general assets of the *London* firm, and that the rule of *Ex parte Waring* only applied if and so far as the remittances were properly applicable to meet the acceptances, and he accordingly directed an enquiry.

Levi's case (1869), L. R. 7 Eq. 449, has already

been referred to and explained (*vid. supra*, p. 29).

In the case of *Ex parte Alliance Bank* (1869), L. R. 4 Ch. App. 423,[b] a security which had, as between the two parties liable to the billholders, been specifically appropriated to meet one set of bills (in the case called the 4th set), had been, by an arrangement between the depositor of the security and the depositee, made at a time when they were at liberty to deal with the security as they pleased, substituted as a security to meet a different set of bills, called in the case the 5th set.

The claim under the rule of *Ex parte Waring* in this case was made by the *Alliance Bank*, who were holders of the 4th set, and it was disallowed by Lord Romilly, M.R., and on appeal by the Lords Justices, on the ground that upon the insolvency of the two estates there was no contract between those estates authorizing the application of the securities in dispute towards payment of the 4th set of bills.

Lord Justice Giffard in deciding against the *Alliance Bank* seems inclined to admit that they would have been entitled under the rule if the original contract had been allowed to stand, for he says (p. 432):—

"I probably should have thought that the decision of the Master of the Rolls could not stand if matters had

[b] Reported before M. R., 17 W. R. 248, on app. 681 ; 38 L. J., N. S., 714.

rested entirely upon the state of things as they existed when the fourth set of bills were drawn; but that is not so."

The case of *Vaughan* v. *Halliday* (1874), L. R. 9 Ch. App. 561; 30 L. T. N. S. 249, on appeal, p. 741, is a distinct authority that a right of double proof on the part of the billholders is absolutely essential for the application of the rule.

In this case a firm abroad drew bills of exchange upon *A.*, and at the same time sent remittances to secure *A.* against his acceptances of those bills. *A.*, however, did not accept the bills, and he and the firm both became insolvent, and their affairs were wound up. The holder of the bills instituted a suit against the trustee of *A.*, and the trustee of the firm, to enforce his claim to have the remittances remaining in the hands of *A.*'s trustee applied towards discharge of his bills. It was held (reversing the decision of Vice-Chancellor Bacon) that the rule of *Ex parte Waring* had no application, as *A.*, the drawer, not having accepted the bills, the holder had no right of double proof, but was simply a creditor of an insolvent firm without any security.

In his judgment, Lord Justice James says as follows (p. 567):—

"The principle of *Ex parte Waring* applies where there are equities to adjust between two parties who become insolvent, and the adjustment of which equities, by a piece of good luck, so far as a third party is concerned, operates for the benefit of such third party. The simple answer to this case is that there are no equities whatever to adjust."

And Lord Justice Mellish, after explaining the case of *Ex parte Smart* (*vid. supra*, p. 31) upon the authority of which case Vice-Chancellor Bacon had relied, proceeded (p. 568):—

"Where there is no right of double proof, whatever may be the equities as between the two firms that are insolvent, I cannot see how there can be any difficulty in settling those equities between the parties without the necessity of giving to the billholder, who is simply a creditor without any security, that security which he has never bargained for." [c]

With reference to the fact that *A.* refused to accept the drafts, Lord Justice Mellish says:—

"The rule of law is applicable, that if a remittance is sent for a particular purpose, whether it be a remittance by bill or a remittance in money, the person who receives the remittance must either apply it for the purpose for which it was sent, or else return it. Therefore as soon as *Ashton* determined not to accept the bills he was bound to return the remittances."

But in the case of *Trimingham* v. *Maud* (*vid. supra*, p. 47), Vice-Chancellor Giffard seems to have taken a different view, for he says (p. 212):—

"Again the fact that the drafts which accompanied these letters were refused acceptance would not prevent the *London* firm, who received the remittances, from having the property in these remittances, or dealing with them. At the utmost, the arrangement between the parties amounted to this, that the firm receiving them might possibly be liable in damages for not accepting the drafts;

[c] See supra, p. 8.

but could not be deprived of the right to deal with the remittances which were so sent."

In *Ex parte Gomez* (1875), L. R. 10 Ch. App. 647, Lord Justice James comments upon these observations of the Vice-Chancellor as follows:—

"It appears that of the remittances, as much as £2,634 were sent with letters announcing drafts for acceptance, and which were not accepted, having arrived after the stoppage. We think that there is very great ground for saying that the language and reasoning of all the learned lords who advised their house in the case of *Shepherd* v. *Harrison* (L. R. 5 E. & I. App. 116), would apply to this case, that from the course of dealing between the parties there would be implied that which would not be (according to mercantile courtesy and usage) said in so many words, viz.: 'I send you the remittances on the faith that you will accept the drafts.' That would no doubt appear to be inconsistent with the decision of the *Vice-Chancellor Gifford* in *Trimingham* v. *Maud;* but it is to be observed that that decision was pronounced some years before the case in the House of Lords, and further that as a matter of fact, the Vice-Chancellor came to the conclusion that there was only one general account, and that the remittances were made on that general account. It is not necessary for any present purpose critically to examine that decision, but we are not sure that we can reconcile the premises and the conclusion in the judgment."

The two following cases of *Ex parte Lambton* and *Ex parte General South American Company* are illustrations of the proposition (*vid. supra*, p. 7) that to bring a case within the rule of *Ex parte Waring* the contract between the two parties liable to the billholders must at the time

of the application of the billholders be still subsisting and incapable of alteration.

In *Ex parte Lambton, In re Lindsay* (1875), L. R. 10 Ch. App. 405, a shipbuilder had entered into a contract to build a ship, the purchase money of which was to be paid by instalments, partly in cash and partly in bills of exchange, to be accepted by the purchaser. The purchaser, after accepting several bills, took proceedings for liquidation, including his liability on the bills among his debts; and his creditors (other than the billholders) passed a statutory resolution to accept a composition of 5s. in the £. Subsequently the purchaser and the trustee of the shipbuilder (who had in the meantime become bankrupt) rescinded the contract.

The holders of the acceptances of the purchaser claimed upon the authority of *Ex parte Waring* to have the ship (which had since been completed by the trustee) sold, and the proceeds applied towards discharge of their bills; but the rule was held by Bacon, C. J., and, on appeal, by the Lords Justices James and Mellish to be excluded on the ground that the contract, of the benefit of which the billholders were seeking to avail themselves, had before their application for that purpose been rescinded as between the drawer and acceptor at a time when both of them were held by the Court at liberty to rescind it.

Lord Justice James in that case said (p. 413):—

"The purchaser had a full right, if he thought it was for the benefit of himself or his creditors, to rescind or abandon

the contract, and to say, 'I cannot complete;' and the other had a right to say, 'We will accept your abandonment of the contract, and we will complete the ship for ourselves, and take whatever remedies we may have.' It seems to be an absolute right in the parties on the one side to make the abandonment, and on the other, to accept it."

And Lord Justice Mellish (*ibid.* p. 416):—

"There are various reasons why the rule in *Ex parte Waring* should not be applied to this case. One conclusive reason is, that at the time when this application was made (the purchaser) had ceased to have any interest whatever in the ship, which was exclusively the property of (the vendor's) estate. *Ex parte Waring* only applies either where the property of the acceptor has been pledged with the drawer, or the property of the drawer has been pledged with the acceptor, and not where the property is exclusively the property of one of the parties."

In the case of *Ex parte General South American Company, In re Yglesias* (1875), L. R. 10 Ch. App. 635.

A *London firm* accepted a bill of exchange drawn upon it by *A.*, a foreigner, residing *abroad*, who remitted another bill of exchange to cover it. Before the arrival of the remittance the *firm* suspended payment, and filed a petition for liquidation, and a receiver and manager was appointed. Subsequently the *firm's* creditors accepted a composition. *A.* afterwards became insolvent and executed a deed of composition, but made no cession of his property, and remained liable to be sued upon the bills.

The General American Company, who were holders of the *firm's* acceptance, applied to have

the proceeds of the remittance which had reached the hands of the receiver of the firm paid over to them.

This application, however, was dismissed on appeal by the Lords Justices (affirming the decree of the Registrar) on the ground that *A.*, though practically insolvent, had not been deprived, by any forced administration, of the right of dealing as he pleased with the remittance which, in the absence of such forced administration, remained his property.

In this case, Lord Justice James said (p. 638):—

"The rule in *Ex parte Waring*, which was originally applied as between two bankrupt estates, has been extended to two insolvent estates which are being administered, one in bankruptcy and one in chancery, or one in bankruptcy, and one in insolvency; but no judge has ever expressed an opinion in favour of extending the rule to a case where, as in the present, one of the parties though practically insolvent, is subject to no jurisdiction, and cannot be compelled to submit his rights to any Court. Here *Madinya* (drawer) can say 'I gave a direction to *Yglesias* as to the application of the remittance, but I am master of that direction, I recall it, I am under no obligation to any human being not to tell *Yglesias* to apply that remittance in any way I please.' In my opinion, the rule cannot be extended to a case where there is a party whose estate is not under administration."

And Lord Justice Mellish (*ibid.*):—

"The Court must take care not to do any act which would deprive a party not under its jurisdiction of any rights of property which he possesses. In a case where two insolvent estates are being administered by the Courts, no Court of Justice allows the rights of the parties to be

altered from what they were at the time when it undertook the administration. But where, though a party is insolvent, his property is not under the control of any Court, he has the ordinary rights of property, and the Court cannot interfere with any directions he may give about his property."

APPENDIX.

25 *April*, 1815. *Ex parte Waring.*—It was ordered . . . . . that it be referred to the Commissioners of Bankruptcy against *Brickwood & Co.* to take an account of the bills outstanding and accepted by *Brickwood & Co.*, and in whose hands such bills now are and what is now remaining due to the holders on the said bills respectively, and that the commissioners take an account of the dividends paid or now liable to be paid by the assignees of *Brickwood & Co.* to the said billholders upon the proofs made by them on the said commission, and that the short bills now remaining unpaid be forthwith sold before the commissioners under the commission against *Brickwood & Co.*, and let the net proceeds of the short bills already received by the assignees of *Brickwood & Co.*, and the amount of the net proceeds to arise by sale of the said short bills hereinbefore directed to be sold, and the said £2,961 after payment thereout of the costs and expenses hereinafter mentioned be deducted from the aggregate amount of the bills outstanding and accepted by *Brickwood & Co.*, and let the several holders of the said bills stand creditors under the commission against *Bracken & Co.*, and under the commission against *Brickwood & Co.*, for the difference in proportion to the

amount of the said bills which they severally hold, and let their respective proofs be reduced accordingly under the said commissions, and let so much of the dividends which the assignees of *Bracken & Co.* have paid in respect of the said proofs in the sums so to be deducted be refunded to them by the said billholders in proportion to the amount of the said bills which they severally hold, and let the net proceeds owing from the said short bills already received by the assignees of *Brickwood & Co.*, and the net proceeds to arise by sale of the said short bills now remaining unpaid and the said £2,961, and all interest made thereon respectively by reason of the same having been invested in Exchequer bills or otherwise, be applied in the first place in payment of the said assignees of *Brickwood & Co.*, and of the costs and charges incurred by them in and about these applications and consequential thereon, and then in reimbursing to the said assignees of *Brickwood & Co.* so much of the dividends which they have paid to the said billholders or the said sums to be deducted from the proofs made by the said billholders under the commission against *Brickwood & Co.*, and let the said assignees of *Brickwood & Co.* apply so much of the residue as may be required in further satisfaction of the said bills outstanding and accepted by *Brickwood & Co.* until the several holders of the said bills shall have received twenty shillings in the pound under and by virtue of the said securities, and let the said assignees of *Brickwood & Co.* pay to the assignees of *Bracken & Co.* what, if anything, shall remain in their hands after satisfying the several payments hereinbefore directed, and, in case the said respective holders of the said bills should be paid in full, let their respective proofs under both the said commissions be expunged, but if the said

securities or the proceeds thereof, and interest as aforesaid, shall not be sufficient to pay the said holders of the said bills in full, let the same be applied so far as the same will extend to pay and satisfy the said bills *pro rata*, and in such case let the said respective proofs be reduced as hereinbefore directed, and let the said billholders receive dividends on the residue of their said proofs *pro rata* with the other creditors under both the said commissions.

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